United States Senate

SELECT COMMITTEE ON INTELLIGENCE
(PURSUANT TO S. RES. 400, 94TH CONGRESS)
WASHINGTON, D.C. 20510

December 8, 1977

Admiral Stansfield Turner
Director of Central Intelligence
Central Intelligence Agency
Langley, Virginia

Dear Admiral Turner:

For the past year the Senate Intelligence Committee's Subcommittee on Secrecy and Disclosure, on which we serve as Chairman and Vice Chairman, has been studying the problem of unauthorized disclosure of classified information. The purpose of this study was to determine whether or not it was necessary to amend the espionage statutes in order to facilitate prosecution of unauthorized disclosure. For many years the intelligence community has contended that the espionage statutes in Title 18 (18 U.S.C. §§793 and 798) were inadequate to deal with the problem of "leaks".

In the course of this study the Subcommittee has reviewed a number of actual "leak" cases as well as classical espionage cases, cases in which there has been a covert transmission of intelligence information to an agent of a hostile power. As we studied these cases we became aware of a very fundamental problem involved in the prosecution of any criminal case in which national security information might be necessary evidence. There are a large number of cases in which the intelligence community and the Department of Justice cannot agree to proceed to prosecution due to fear of disclosure of classified information in the litigation. Defense counsel aware of this impasse, and knowing that the intelligence community would in the most sensitive cases prefer no further investigation or prosecution than to have further secrets disclosed, exploit the sensitivity and in effect thwart the administration of justice. One intelligence community memorandum described this process as "gray mail".

A recent editorial in the New York Times pointed out that Attorney General Bell faced a similar problem as he engaged in plea bargaining with former Director of Central Intelligence Richard Helms in the case of his alleged perjury before a Congressional committee. The Times editorial warned that if some

effort was not made to develop procedures for the use of classified information in criminal trials that defendants in cases requiring the use of national security information might engage in a form of "blackmail" which courts might find "legitimate".

Although this problem is most frequently encountered in espionage cases, other prosecutions have been similarly impeded. As noted in the enclosed speech Senator Biden recently delivered, the Watergate case and major narcotics and organized crime cases where the defendants or the subject of investigation, having had a prior relationship with an intelligence agency, used the often tacit threat of disclosing that fact or other classified information to frustrate the prosecution.

The overriding concern of the members of the Senate Intelligence Committee is that a failure to resolve this dilemma on the use of intelligence information in criminal prosecution might seriously undercut the Committee's effort to develop statutory charters and restrictions on the intelligence community. At the top of the agenda of the Intelligence Committee's work is an effort to carefully refine specific limitations on intelligence activities, e.g., restrictions on domestic activities, on intervention in the affairs of democratically elected governments abroad, on the privacy and First Amendment rights of American citizens throughout the world. If we are to attach criminal sanctions to these various prohibitions a failure to resolve this dilemma would mean that any intelligence official charged with a violation of the prohibitions might be able to use intelligence information to avoid or limit prosecution.

It is our hope that the Secrecy and Disclosure Subcommittee of the Intelligence Committee can hold hearings on this matter in late January or early February. In anticipation of these hearings we have instructed the staff to prepare background materials on this problem for the purpose of discussing it with members of the Executive Branch and experts like yourself. Therefore, we have also enclosed a more detailed memorandum including a paper that addresses various options for resolution of this problem.

We are writing to you at this time because we intend to hold public hearings on this matter in late January. We will invite you as a witness and we thought that the enclosed materials, especially the paper on "Issues and Options" would be valuable in discussions between our staffs on this subject. We will contact you in the near future with a specific date for testimony.

Sincerely,

Joe Biden

Joseph R. Biden, Jr.
Chairman, Subcommittee on
Secrecy and Disclosure

James B. Pearson

James B. Pearson
Vice Chairman, Subcommittee
on Secrecy and Disclosure

Enclosures